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Bobby Boye v. USA

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3662

BOBBY BOYE
a/k/a Bobby Ajiboye
a/k/a Bobby Aji-Boye,
Appellant

v.

UNITED STATES OF AMERICA

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3-16-cv-06024)
District Judge: Hon. Freda L. Wolfson

Submitted under Third Circuit L.A.R. 34.1(a)
November 22, 2019

Before: CHAGARES, MATEY, and FUENTES, *Circuit Judges*.

(Opinion filed: April 22, 2020)

OPINION*

* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

FUENTES, *Circuit Judge*.

Appellant Bobby Boye pled guilty to one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 for fraudulent representations made in his role as a legal advisor. Boye now claims he was deprived effective assistance of counsel during plea negotiations because counsel failed to advise him that the amount of “loss” caused by his fraud should be offset by the value of the work he provided to the victims. For the reasons that follow, we will affirm the District Court’s denial of relief.

I.

Following a period of incarceration in the California State Prison System, Boye moved to New Jersey. Shortly after, he was admitted to the practice of law in New York State. Boye was then hired by the Kingdom of Norway to serve as an international petroleum legal advisor for the Ministry of Finance of Timor-Leste. In his role as legal advisor, Boye served as a member of a three person committee responsible for evaluating bids solicited by Timor-Leste for a multi-million dollar contract to provide legal and tax accounting services. Ultimately, a company called Opus & Best Law Services LLC (“Opus & Best”) was awarded the contract.¹ Opus & Best appeared to be composed of several lawyers and other professionals, but in reality Boye was the sole member. Boye authored fraudulent documents and created a misleading website to support the bid. In order to profit from his scheme, Boye needed to make it appear as if Opus & Best completed the work it was hired to do. Accordingly, Boye retained outside legal and tax

¹ App. 1423-49.

professionals, and Timor-Leste paid Opus & Best—and unbeknownst to it, Boye—\$3.5 million.

Based on his fraudulent conduct, Boye pled guilty to violating § 1349. As relevant here, the applicable United States Sentencing Guideline is § 2B1.1. U.S.S.G. § 2B1.1 sets a base offense level of 7 for Boye’s crime and provides that the offense level be increased depending on the monetary loss caused by the crime.² Boye stipulated that the “aggregate loss” caused by his fraudulent behavior was “greater than \$2,500,000 but not more than \$7,000,000,” increasing his offense level to 25 under the Guidelines.³ After various upward and downward adjustments, Boye stipulated to a total Guidelines offense level of 24. Based on a criminal history category of III and an offense level of 24, the Government calculated an advisory Guidelines range of 63 to 78 months. In keeping with Boye’s plea agreement and the stipulations between the parties, the District Court sentenced Boye to 72 months’ imprisonment. Boye filed a direct appeal to this Court, and we granted the Government’s motion to enforce an appellate waiver contained in the plea agreement and dismissed the appeal.

Subsequently, Boye moved for relief from his sentence under 28 U.S.C. § 2255, alleging ineffective assistance of counsel. The District Court denied Boye’s motion. Boye then filed a Notice of Appeal and Request for a Certificate of Appealability with

² U.S. Sentencing Guidelines Manual § 2B1.1 (U.S. Sentencing Comm’n 2014) (hereinafter “U.S.S.G.”). The base offense level is 7 because the substantive offense of wire fraud has a statutory maximum term of imprisonment of 20 years or more. *See* 18 U.S.C. § 1343.

³ App. 1452.

this Court. We granted the request “as to [Boye’s] claim that counsel performed ineffectively by failing to advise him during plea negotiations that the amount of loss caused by the fraud should be offset by the value of the services that Boye provided.”⁴

II.

The District Court exercised jurisdiction over Boye’s petition for post-conviction relief under 28 U.S.C. § 2255. We exercise jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 2253. On appeal of an order denying a § 2255 motion, we review the District Court’s legal conclusions *de novo* and factual findings for clear error.⁵

III.

Boye argues that his trial counsel performed ineffectively by failing to advise him during plea negotiations that the amount of loss caused by his fraud should be offset by the value of the services he provided. Accordingly, he contends that he is entitled to have his sentence vacated and proceed with a new sentencing hearing using a lower loss amount.

Under *Strickland v. Washington*, to succeed on an ineffective assistance claim, Boye must show that (1) the errors by his attorney were so serious that his counsel was not functioning at the level guaranteed by the Sixth Amendment, and (2) his counsel’s deficient performance prejudiced his defense.⁶ It is not enough for Boye to show that any errors by counsel “had some conceivable effect on the outcome of the proceeding.”⁷

⁴ App. 18.

⁵ *United States v. Green*, 898 F.3d 315, 317 (3d Cir. 2018).

⁶ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁷ *Id.* at 693.

Instead, the appropriate test for prejudice is whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁸

We conclude that Boye cannot show that his attorney’s allegedly deficient performance prejudiced him. Boye failed to demonstrate that but for his counsel’s purported errors, he would have gone to trial, received a more favorable plea deal, or have been better off pleading guilty without the benefit of a plea agreement. Accordingly, we need not decide whether Boye’s counsel performed deficiently.⁹

Boye argues that by being advised to stipulate to a loss amount “greater than \$2,500,000 but not more than \$7,000,000,” his offense level was increased from 6 to 24.¹⁰ However, he fails to account for the fact that even if a credit for services rendered was taken from the loss amount, he would have to show enough credit against his losses to lower the loss amount below \$2,500,000 in order to secure a lower offense level under the U.S.S.G. § 2B1.1 loss table.

Moreover, the Government stresses that Boye’s loss amount did not include other related costs, including (i) his \$130,000 salary, (ii) the additional \$250,000 he attempted to defraud Timor-Leste out of, or (iii) the \$979,000 in expenses Timor-Leste spent

⁸ *Id.* at 694.

⁹ *Strickland*, 466 U.S. at 697 (“[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.”).

¹⁰ Boye erroneously asserts in his briefs that his base offense level was 6. As the plea agreement indicated, Boye’s base offense level was 7 because the substantive offense of wire fraud has a statutory maximum term of imprisonment of 20 years or more. U.S.S.G. § 2B1.1(a)(1).

uncovering the fraud. If Boye's loss amount included these costs alone, it would have totaled \$1,359,000, resulting in an offense level of 21. Had the loss amount included the above costs plus the over \$850,000 in tax proceeds Boye diverted, which the Probation Office accounted for in its loss calculation, Boye's offense level would have been 23. In no scenario would Boye's loss amount be zero, as he contends, and he has failed to set forth the purported off-set amount to show that his sentence would have been materially impacted, or that he would have been on stronger plea bargaining grounds. Additionally, any potential lower offense level could easily be negated by other benefits that Boye received in the agreed upon plea deal.

Boye benefitted from the plea agreement that was struck in several respects. First, the plea agreement allowed Boye to avoid certain enhancements and motions for upward departures and granted other downward adjustments. Second, by agreeing to plead guilty, the Government dismissed six counts and did not initiate any other charges against Boye related to his scheme. Finally, the plea agreement capped Boye's restitution amount, which otherwise could have been significantly higher. Ultimately, Boye was sentenced to a term within the stipulated Guidelines range.

These facts demonstrate that there is no reasonable probability that but for the supposedly deficient performance of Boye's counsel, Boye would have been better off. Accordingly, it was not error for the District Court to conclude that Boye failed to show

any prejudice from the alleged failure of counsel to argue for a loss amount offset during plea negotiations.¹¹

IV.

For the foregoing reasons, we will affirm the judgment of the District Court.

¹¹ We decline to address Boye's arguments that are outside of the scope of the issued certificate of appealability, including his claims for ineffectiveness of counsel at sentencing and in negotiating the restitution amount. 3d Cir. L.A.R. 22.1(b); *see also Miller v. Dragovich*, 311 F.3d 574, 577 (3d Cir. 2002) (refusing to address an argument that was outside the scope of the certificate of appealability).